

employment with respondent. Respondent was also ordered to pay claimant's medical expenses except for those related to her right carpal tunnel syndrome as the ALJ concluded that claimant failed to meet her burden of proof as to the causal connection between her carpal tunnel condition and her work-related injury. In making his decision, the ALJ expressly overruled claimant's objection to Dr. Rosenthal's written report dated April 6, 2010.

The claimant requests review of two issues. First, whether the ALJ erred in overruling her objection to Dr. Rosenthal's report and considering its contents, in violation of K.S.A. 44-515. Second, whether the ALJ erred in failing to award any permanency for claimant's carpal tunnel complaints. Claimant argues that the respondent improperly withheld the report of Dr. Rosenthal thereby depriving claimant of an opportunity to have her expert, Dr. John Pazell review and comment on Dr. Rosenthal's report and conclusions. Therefore, claimant argues that the Board should set aside the ALJ's evidentiary ruling, exclude Dr. Rosenthal's April 6, 2010 report, and modify the Award to find that claimant had a 16 percent whole body permanent impairment as well as medical benefits for all body parts involved.

Respondent maintains that claimant's cervical complaints and carpal tunnel syndrome are not work-related and therefore claimant should be limited to a 10 percent functional impairment to the right upper extremity at the shoulder. Should the Board find claimant's neck and wrist complaints are work-related, respondent alternatively argues that the ratings of Dr. Prostic represent an accurate assessment of impairment. All other aspects of the Award respondent believes should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was employed by the respondent as a paraprofessional, assisting disabled students. On February 12, 2007, she was tending to a student who was riding a bicycle as part of his therapy. The student came near a wall and claimant reached out to grab the bicycle. She immediately felt pain in her neck and shoulder, and within days, numbness in her right upper extremity. Before this event, claimant had never experienced any problems with her right upper extremity or her neck.

Compensability of the shoulder has never been an issue. Claimant was provided with treatment in the form of medications and physical therapy. Both her shoulder and her neck were evaluated and on February 27, 2007, claimant had an EMG which revealed moderate carpal tunnel syndrome on the right. Claimant had surgery to her right shoulder followed by physical therapy.

When her neck and right wrist complaints continued to go unaddressed, claimant requested a preliminary hearing. The ALJ granted claimant's request with respect to her neck complaints, but concluded that the carpal tunnel complaints were not causally related to her accident. He reasoned that "[i]n most cases, carpal tunnel symptoms arise from repetitive job duties rather than a single accident. On the other hand, the claimant testified that the symptoms arose somewhat contemporaneously with the work accident. There is clearly a carpal tunnel injury, but at this point there is not a preponderance of evidence to prove that it was caused by the February 12, 2007 accident."³

Claimant then sought an evaluation from Dr. Lynn Ketchum, a hand specialist, who made some recommendations for treating her carpal tunnel complaints. Dr. Ketchum opined that claimant's carpal tunnel was not likely the result of the specific work accident, but was aggravated by the specific work accident.⁴ Claimant also offered a report by Dr. Pazell that indicated she was in need of treatment and an EMG cannot be quantified in time. Thus, he seemed to believe her complaints were attributable to the accident even though the damage shown by the EMG was moderate in nature.

At respondent's request, claimant was evaluated by Dr. Anne Rosenthal, who ordered a second EMG. That second EMG confirmed further damage to the nerves but Dr. Rosenthal opined that claimant's carpal tunnel condition was so far advanced that when diagnosed, just 15 days after her accident, it was most certainly not caused by her work-related accident.

That difference of opinion formed the basis for a second preliminary hearing which was held on February 25, 2009. Again, claimant's request for treatment was denied. In this Order, the ALJ denied claimant's request because he concluded that -

The medical experts' opinions did not, on balance, support the claimant's contention that she developed carpal tunnel syndrome from the February 12, 2007 work accident. The claimant did not prove by a preponderance of the evidence that the carpal tunnel problem was caused or aggravated by the single traumatic accident in this case. The claimant's request for medical treatment of the carpal tunnel condition in this case is denied.⁵

The December 27, 2007 preliminary hearing order was reversed by one member of the Board, after he concluded that -

³ ALJ Order (Dec. 27, 2007) at 2.

⁴ *Id.* (Feb. 26, 2009) at 1.

⁵ *Id.* (Dec. 27, 2007) at 2.

Although the positive carpal tunnel syndrome results from the EMG performed in February 2007 mean that claimant's carpal tunnel syndrome condition preexisted the February 2007 accident, the condition had been asymptomatic. The accident clearly aggravated claimant's carpal tunnel syndrome symptoms. The medical opinions of Dr. Pazell and Dr. Ketchum, in particular, support claimant's contention in this regard. Based on the record presented to date, this Board Member finds that claimant's carpal tunnel syndrome condition is compensable as an aggravation of a preexisting condition.⁶

Claimant's care continued, with Dr. Rosenthal taking charge of her care. Surgery was done on the right wrist and ultimately, claimant was released from care. Following her hand surgery claimant sought an additional evaluation from Dr. Pazell. Because the parties could not agree upon claimant's impairment, an independent medical examination was requested by the ALJ and Dr. Edward Prostic was appointed to conduct the examination. Thereafter, a Regular Hearing was held.

Dr. Pazell testified that claimant bears a 40 percent impairment as a result of the entrapment neuropathy and severe medial nerve wrist along with an additional 20 percent impairment due solely to claimant's loss of strength. When combined, this yields a 52 percent to the upper extremity. Dr. Pazell's written report notes that -

Her injury of **February 12, 2007** was the direct and proximate cause leading to the rotator cuff tear clearly as well as contributing to the carpal tunnel syndrome severity as opined by Dr. Ketchum. I would agree totally with his opinion.⁷

Dr. Rosenthal eventually was asked to provide a rating for claimant's impairment. That letter, dated January 5, 2010, was signed on April 6, 2010 and transmitted to respondent's insurance carrier. That report eventually found its way to respondent's counsel. He, in turn, sent a copy to claimant's counsel on May 6, 2010. Claimant notified respondent of its objection to the letter due to lack of timely disclosure under K.S.A. 44-515.

Dr. Rosenthal's letter was not the result of a single evaluation. Rather, it was a summary of her treatment of the claimant as well as a critique of Dr. Pazell's October 29, 2009 rating report. She took issue with his methodology of rating not only the entrapment neuropathy but the loss of strength as well. Her report goes on to provide a rating, which she indicates is 10 percent impairment to the right upper extremity.

⁶ Board Order, 2009 WL 1314325 at 6 (Apr. 27, 2009).

⁷ Pazell's Depo., Ex. 3 at 10 (Dr. Pazell's Oct. 28, 2009 report) (emphasis in original).

Dr. Prostic's report rates the neck at 5 percent and the right carpal tunnel at 10 percent. Although not specifically stated in his report, it appears that he believed all of the assigned impairment was attributable to claimant's February 12, 2007 accident.⁸

There are two issues to be decided in this appeal. First, the admissibility of a report, signed April 6, 2010, and authored by Dr. Rosenthal. The report is critical of Dr. Pazell's methodology of rating claimant's carpal tunnel complaints. Claimant maintains that respondent delayed production of this report until after Dr. Pazell was deposed so as to deprive claimant of any meaningful opportunity to have Dr. Pazell explain and/or defend his methodology. Claimant timely objected to this report under K.S.A. 44-515. Respondent maintains that the report was produced as soon as it was received by its counsel and in any event, the statute, K.S.A. 44-515, isn't applicable to the instant situation.

K. S. A. 44-515 states:

(a) After an employee sustains an injury, the employee shall, upon request of the employer, submit to an examination at any reasonable time and place by any one or more reputable health care providers, selected by the employer, and shall so submit to an examination thereafter at intervals during the pendency of such employee's claim for compensation, upon the request of the employer, but the employee shall not be required to submit to an examination oftener than twice in any one month, unless required to do so in accordance with such orders as may be made by the director. Any employee so submitting to an examination or such employee's authorized representative shall upon request be entitled to receive and shall have delivered to such employee a copy of the health care provider's report of such examination within 15 days after such examination, which report shall be identical to the report submitted to the employer. If the employee is notified to submit to an examination before any health care provider in any town or city other than the residence of the employee at the time that the employee received an injury, the employee shall not be required to submit to an examination until such employee has been furnished with sufficient funds to pay for transportation to and from the place of examination at the rate prescribed for compensation of state officers and employees under K.S.A. 75-3203a and amendments thereto, for each mile actually and necessarily traveled to and from the place of examination, any turnpike or other tolls and any parking fees actually and necessarily incurred, and in addition the sum of \$15 per day for each day or a part thereof that the employee was required to be away from such employee's residence to defray such employee's board and lodging and living expenses. The employee shall not be liable for any fees or charge of any health care provider selected by the employer for making any examination of the employee. The employer or the insurance carrier of the employer of any employee making claim for compensation under the workers compensation act shall be entitled to a copy of the report of any health care provider who has examined or

⁸ Dr. Prostic's IME Report dated January 25, 2010 at 3.

treated the employee in regard to such claim upon written request to the employee or the employee's attorney within 15 days after such examination or treatment, which report shall be identical to the report submitted to the employee or the employee's attorney.

(b) If the employee requests, such employee shall be entitled to have health care providers of such employee's own selection present at the time to participate in such examination.

(c) Unless a report is furnished as provided in subsection (a) and unless there is a reasonable opportunity thereafter for the health care providers selected by the employee to participate in the examination in the presence of the health care providers selected by the employer, the health care providers selected by the employer or employee shall not be permitted afterwards to give evidence of the condition of the employee at the time such examination was made.

(d) Except as provided in this section, there shall be no disqualification or privilege preventing the furnishing of reports by or the testimony of any health care provider who actually makes an examination or treats an injured employee, prior to or after an injury.

For whatever reason, Dr. Rosenthal's report was not produced *to either party* in a timely fashion. But like the ALJ noted, her report is not the result of an examination. Rather, it is a summary of her treatment, ultimate rating opinions and a critique of Dr. Pazell's rating methodology. Thus, K.S.A. 44-515 does not control. Claimant could have reconvened Dr. Pazell's deposition and moreover, even if there was some nefarious purpose in delaying its disclosure (as claimant suggests) she could have asked for the costs associated with that deposition be assessed to respondent. This would have allowed Dr. Pazell an opportunity to address Dr. Rosenthal's criticisms. In any event, the inclusion of her report is of little consequence to the Board's ultimate decision. The ALJ's decision to overrule claimant's objection to Dr. Rosenthal's report is affirmed.

The second and final issue to be determined in this appeal is the nature and extent of claimant's permanent impairment. While there is no dispute as to the shoulder impairment, respondent suggests that claimant bears no permanency as a result of her neck complaints and any permanency that exists relative to the carpal tunnel condition were preexisting and not causally related to claimant's accident.

After considering the entire record, the Board finds the ALJ's Award as to the neck and the carpal tunnel condition should be affirmed in part and modified in part. As it relates to claimant's neck condition, the Board is persuaded, as was the ALJ, that claimant sustained a neck injury which has left her with a 5 percent permanent partial impairment to the whole body. Dr. Prostic testified that claimant's neck was injured in the accident and there was no evidence to suggest that claimant did not sustain the impairment he found.

Accordingly, the ALJ's award of 5 percent permanent partial impairment to the neck is affirmed.

The ALJ denied claimant any permanency for her carpal tunnel condition as he continued to maintain that Dr. Rosenthal's opinion was, in his view, more persuasive. But as explained above, Dr. Rosenthal's opinion notwithstanding, there was evidence in this record to suggest that claimant *aggravated* her underlying carpal tunnel. And aggravations of underlying conditions are compensable under our law.⁹ Here, there is no dispute that claimant never had any symptoms in her right wrist until this accident. And then she began to notice pain and numbness, coupled with confirmed EMG results which revealed carpal tunnel syndrome. That condition became symptomatic as a result of her injury. This view was endorsed by Dr. Pazell and first voiced by Dr. Ketchum. Unlike the ALJ, the Board is more persuaded by the testimony and opinions voiced by Dr. Pazell and concludes that portion of the Award should be modified to include 10 percent permanent impairment to claimant's right upper extremity as per the rating opinion of Dr. Prostic. And because claimant bears a whole body impairment, the two upper extremity impairments will be combined, converted (pursuant to the *Guides*) and as a result, yields a 16 percent whole body impairment.

In addition, the Award is modified to include medical benefits for claimant's treatment relating to her past treatment of her carpal tunnel complaints and future medical treatment, upon proper application to the Director.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated June 15, 2010, is affirmed in part and modified in part as follows:

The claimant is entitled to 1 week of temporary total disability compensation at the rate of \$228.61 per week or \$228.61, followed by 66.40 weeks of permanent partial disability compensation at the rate of \$228.61 per week or \$15,179.70 for a 16 percent permanent partial disability compensation for a total award of \$15,408.31.

As of December 30, 2010, there would be due and owing 1 week of temporary total disability compensation at the rate of \$228.61 per week in the sum of \$228.61, followed by 66.40 weeks of permanent partial disability compensation at the rate of \$228.61 per week in the sum of \$15,179.70 for a total due and owing of \$15,408.31.

⁹ Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

In addition, claimant is entitled to medical benefits for her treatment relating to her past treatment of her carpal tunnel complaints and future medical treatment, upon proper application to the Director.

IT IS SO ORDERED.

Dated this _____ day of December 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge